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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-461

ALECK ALEXANDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 22, 1974. The jurisdicition of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is a Public Health Service Officer who suffers permanent injuries at the hands of negligent army medical personnel prevented from recovering under the Federal Tort Claims Act because he has received medical and temporary disability retirement benefits to which he is statutorily entitled by reason of his government service?

2. Are statutory benefits provided Public Health Service Officers regardless of the nature of the disability or the manner in which it is incurred to be equated with a "comprehensive compensation plan" afforded other goverment employees suffering accidental injury in the performance of their duty so as to prevent the Public Health Service Officer receiving such employment related benefits from recovery under the Federal Tort Claim Act?

3. Is a disability incurred by a Public Health Service Officer(while on sick leave and excused from duty)by reason of medical malpractice during elective surgery incident to military service so as to foreclose recovery

under the Federal Tort Claims Act?

STATUTORY AND REGULATORY PROVISIONS INVOLVED

FEDERAL TORT CLAIMS ACT. 28 U.S.C. §2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitivie damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurrred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively for whose benefit the action was brought, in lieu thereof.

CAREER COMPENSATION ACT. 42 U.S.C. §2132

(a) Commissioned officers of the Service or their surviving beneficiaries are entitled to all the rights, benefits, privileges, and immunities now or hereafter provided for commissioned officers of the Army or their surviving beneficiaries under the following provisions of Title 10:

(2) Chapter 61, Retirement or Separation for Physical Disability, - - -.

WHICH SAID PROVISION, 10 U.S.C. §1202 ,PROVIDES:

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training) under section 270(b) of this title for a period of more than 30 days, would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature. the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

MEDICAL AND DENTAL CARE, 10 U.S.C. §1071, 1072

The purpose of sections 1071-1085 of this title is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

§1072

Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

FEDERAL EMPLOYEES COMPENSATION ACT, 5 U.S.C. §8101 st. seq.

§8101. Definitions

For the purpose of this subchapter —

(1) "employee" means - - - but does not include —

(i) a commissioned officer of the Regular Corps of the Public Health Service;

§8116(C) LIMITATIONS ON RIGHT TO RECEIVE COMPENSATION

The liability of the United States or an instrumentality thereof under this sub chapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

PUBLIC HEALTH SERVICE REGULATIONS, 42 C.F.R. §21.81(g)

"Sick leave" means any period of one day or more with respect to which an officer is excused from duty because of sickness, disability, or need of medical services.

STATEMENT OF THE CASE

In March, 1968 Aleck Alexander was a Sanitary Engineer Director with the United States Public Health Service. The terms of his professional service were such that he was entitled, by provisions of 10 U.S.C. §1071 to medical, surgical and hospital care by his employer. He secured a sick leave, defined in Public Health Service Regulations 42 C.F.R. 21.81 , as "any period of one day or more with respect to which an officer is excused from duty because of sickness, disability, or need of medical services" and presented himself to an army hospital for elective surgery. During the course of the operation he sustained a period of hypoxia and cyanosis over a ten to fifteen minute period which resulted in anoxic encephalopathy and consequent central nervous system disorder.

As a result of this injury he was rated 100% disabled by the Public Health Service and received temporary disability retirement benefits under 10 U.S.C. §1202 until August 6, 1972 at which time he was returned to service.

A claim for damages was filed under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671-80, asserting that the injury occurred by reason of the medical malpractice of the army personnel. The case was heard before Judge John W. Oliver who entered a judgment in favor of Aleck Alexander in the amount of $230,000 after crediting the

government with $44,742.73 in disability benefits paid to the plaintiff.

The United States Circuit Court for the Eighth Circuit reversed on the grounds that:

1. The service related benefits received by plaintiff constituted a "comprehensive compensatory plan" that provided an exclusive remedy; and

2. The injury suffered by plaintiff, a Public Health Service Officer, defined by 10 U.S.C. §1072 as part of the "Uniformed Services", while on sick leave and excused from duty but subject to recall was analogous to those cases in which military personnel were barred from recovery under the Federal Tort Claims Act for injuries incurred "related to and dependent upon military service while "subject to military control".

ARGUMENT

The court of appeals has decided on important question of federal law which has not been, but should be, settled by this court and in doing so it has pronounced a rule of law in conflict with applicable decisions of this court. The opinion from which relief is sought holds, in effect, that any federal public servant receiving service related benefits is foreclosed from pursuing his or her rights under the Federal Tort Claims Act.

Aleck Alexander, an experienced sanitary engineer, is a commissioned officer in the Public Health Service. These officers, described in the record as "a group of very dedicated, esprit de corps type of people" are "primarily professional people - - - physicians, by and large, - - dentists, veternarians, dieticians, nurses." In order to attract these highly skilled professionals into government work and maintain the esprit de corps which characterizes the service, they are provided certain employment benefits to supplement their wages which, unlike the earnings of their fellow professionals are limited by law.

In this instance Mr. Alexander, suffering from a gall bladder condition, exercised one of those benefits to which he was entitled and sought medical service from a military hospital. He was victimized by a series of negligent acts and omissions which resulted in anoxic encepalopathy and consequent central nervous system

disorder impairing his speech, vision, dexterity and strength. For three and a half years he was rated by the Public Health Service as being 100% disabled and during that time received temporary disability benefits to which his public service entitled him.

The question posed by this case is whether the exercise of these rights afforded this public servant as part of his career benefits deprive him of his right to sue under the Federal Tort Claims Act?

Heretofore there have been but two classes of cases in which public servants are foreclosed from recovery:

> . . . Those in which the victim has suffered accidental injury in the performance of work duties and received "comprehensive compensation" benefits;
>
> those in which military personnel under military control suffer injuries while engaged in activity "incident to service".

Aleck Alexander's case falls under neither classification.

A "comprehensive compensation plan" is a term of art. It implies accidental injury from work connected injury. Historically it was a trade-off, the workman surrendering his right to common law actions against his employer for a statutory plan of compensation. That feature is incorporated into the Federal Employees Compensation Act which provides for benefits and, as quid pro quo, excludes recovery under the Federal Tort

Claims Act 5 U.S.C. §8116(c). The act incorporates other compensation features:

medical services, appliances and supplies
vocational rehabilitation
temporary total disability payments
permanent partial disability payments
permanent total disability payments
scheduled injury payments
disfigurement payments
funeral and burial expenses

as well as other typical provisions of "compensation" plans, such as second injury funds, subrogation rights against third person tort feasors, options for payments, etc.

There is no relation whatever to the career benefits which Aleck Alexander received and this compensation package. If the court is willing to equate the plaintiff's benefits to workmans' compensation, how would they regard the benefits afforded to the judiciary? By statute judges with ten years service are afforded full retirement benefits when disabled, those with less than ten years service are afforded half. 28 U.S.C. §372. As with the professionals in Public Health Service, these peripheral career benefits are an integral part of the overall compensation system to attract competent legal professionals into public service. But what happens if the judge's invocation of those benefits is necessitated by a negligent act of the government? Would the Eighth Circuit state that the benefits of receiving full salary for life "compare quite favorably with these (benefits) available under two other plans which the

Supreme Court has deemed to exclusive remedies, the Federal Employees Compensation Act[1] - - - and the Federal Prison Funds?[2] (Opinion, pps. 4,5). Would a disabled judge's recovery for pain and suffering be denied on the basis that such an award would grant a member of the judiciary "greater rights than government employees, prisoners or members of the armed forces'? (Opinion, p. 5).

Of course such reasoning is ridiculous but that very reasoning forms the basis of the lower court's opinion. The receipt of career benefits to which plaintiff was entitled should have no effect whatever upon this public servant's right to pursue a cause of action under the Federal Tort Claims Act and in so holding that such benefits provided an exclusive remedy this decision is in conflict with Brooks v. United States, 337 U.S. 49 (1949) in which this

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1. The Supreme Court didn't have to find that the Federal Employees Compensation Act was exclusive. 5 U.S.C. §8116(C) specifically says so.

2. As stated in United States v. Demko, 385 U.S. 149 the benefits paid injured prisoners "rests on the schedules of payment of the Federal Compensation Act". Even so the lower court held that there was no exclusivity of relief and Justices Douglas and White agreed.

court held - - "there is nothing in the Tort Claims Act or the veterans law (in this case Public Health Service laws) which provides for exclusiveness of remedy. - - - We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so". 337 U.S. at 53.

The lower court adds a second reason for denying recovery. The opinion holds that in submitting to elective surgery while on sick leave and excused from duty Aleck Alexander was engaged in activity "incident to service".

The last case decided by this Court which utilizes the "incident to service" exception was United States v. Brown, 348 U.S. 110 (1954) in which this court affirmed the distinction "between injuries that did and injuries that did not arise out of or in the course of military duty". That distinction was first made in Feres v. United States, 340 U.S. 135 (1950) and for obvious reasons. As explained by Justice Douglas in Brown, "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character".

How does the opinion finesse the logic and language of Feres, Brown and Brooks?

First, by equating the Public Health service with the "military" because it is statutorily identified as part of the "uniformed services".

Second, by holding that even though plaintiff was on sick leave and excused from duty he was "subject to call" (citing 42 C.F.R. §21.91) which fact "immediately distinguishes this case from Brooks v. United States, 337 U.S. 49 (1949), in which the plaintiff was on furlough when injured;" (Opinion 7).

The court thus assumes that soldiers on furlough are not subject to recall. Of course such an assumption is fatuous.[3] If we can cancel a Public Health Service Officer's sick leave to help fight an epidemic we can certainly recall a soldier from furlough to fight a war.

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3. Army Regulation 630-5, Chapter 1-4 provides that upon a declaration of war or national emergency all advance, excess and emergency leaves are suspended. Chapter 4-7 provides that personnel on leave may be ordered to temporary duty.

There is no grounds of distinction between the instant case and the Brooks decision and in holding that a distinction lies on such grounds the lower court is in direct conflict with applicable decisions of United States v. Brown, 348 U.S. 110 (1954) and Brooks v. United States, 337 U.S. 49 (1949) and contrary to the reasoning expressed in Feres v. United States, 340 U.S. 135 (1950).

CONCLUSION

This is a case of first impression and deals with the rights of every professional public servant. If this decision is allowed to stand then every public servant who receives career benefits which are an integral part of his emolument package, does so at the cost of surrendering his right to pursue a cause of action under the Federal Tort Claims Act. The statutes specifically exclude Aleck Alexander from compensation benefits 5 U.S.C. §8101(I)(E)(ii). This decision excludes him from Federal Tort Claims coverage. What is left when he suffers permanent disabling injuries from gross medical malpractice by the Government? Only these benefits that he contracted for when he entered public service and were to be his right whenever he became disabled for any reason. To have a negligent government take advantage of this contract right is unconscionable. This opinion cannot be allowed to stand. The price of a professional to enter public service is high enough without stripping him of his statutory right to sue the government when he is injured by its negligence.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1816 & 73-1850

Aleck Alexander,
Appellant, Cross-Appellee,

v.

United States of America,
Appellee, Cross-Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 10, 1974.
Filed: July 22, 1974.

Before BRIGHT, STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

The central issue to be determined on this appeal is whether the statutory disability compensation plan[1] for commissioned officers of the Public Health Service is an exclusive remedy which precludes an action for medical malpractice under the Federal Tort Claims Act.[2] The trial court held that the statutory benefits were not such an exclusive remedy and awarded damages to plaintiff Alexander. We disagree and reverse that determination.

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1. *See* 42 U.S.C. §213a(a)(2); 10 U.S.C. §§1202, 1401 (1970).
2. 28 U.S.C. §§2671-80 (1970).

Plaintiff Alexander,[3] a commissioned officer of the Public Health Service (PHS), underwent elective surgery at a military hospital on March 20, 1968 for removal of his gall bladder. He was entitled to such free medical care as a member of the "uninformed services," as defined in 10 U.S.C. §1072(1)(1970).[4]

During the course of the operation, an anesthesiologist's tube placed in Alexander's trachea malfunctioned, either because of improper insertion or inadequate monitoring by the supervisory personnel. As a result of this negligence, Alexander suffered numerous physical infirmities, including temporary blindness and paralysis, residual uncoordination of the feet and upper extremities, and permanently defective vision.

Due to these injuries, Alexander was rated 100% disabled and placed on temporary disability retirement status for a period of approximately two and one-half years, pursuant to the procedures specified in 10 U.S.C. §§1205, 1210, 1211 (1970). During that time he was paid disability compensation in excess of $44,000 under the Career Compensation Act, *see* 10 U.S.C. §§1202, 1401, 42 U.S.C. §213a (1970). On August 6, 1972, Alexander was recalled to active duty with the PHS as provided in 10 U.S.C. §§1210, 1211 (1970).

In his complaint, plaintiff grounded jurisdiction on 28 U.S.C. §1346(b) (1970) and the Federal Tort Claims Act, 28 U.S.C. §§2671-80 (1970). He claimed damages for the alleged negligence of the doctors and other medical personnel who had participated in his anesthetization. The

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3. Plaintiff Alexander is the appellant in No. 73-1816 and the cross-appellee in No. 73-1850.

4. 10 U.S.C. §1072(i) (1970) provides:

"Uniformed services" means the armed forces and the Commissioned Corps of the Environmental Science Services Administration and of the Public Health Service.

government argued that Alexander's suit should be dismissed on the basis of the principles established in *United States* v. *Demko*, 385 U.S. 149 (1966) and *Feres* v. *United States*, 340 U.S. 135 (1950). We agree.

In *Demko*, *supra*, the Supreme Court considered the question of whether an injured federal prisoner, having received disability compensation under a specific federal statute,[5] could maintain an action for damages under the Federal Tort Claims Act. The Court denied relief under the Act, stating that "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group." *Id.* at 152.

In so holding, the Court expressly rejected the argument, made by Alexander in the case before us, that a compensation statute will be presumed to be a non-exclusive remedy in the absence of specific language to the contrary. *Id.* The Court noted that generally workmen's compensation laws are considered to be exclusive substitutes for common law tort remedies and cited two cases, *Patterson* v. *United States*, 359 U.S. 495 (1959), and *Johansen* v. *United States*, 343 U.S. 427 (1952), as having established a "general rule" of presumed exclusivity. *Id.* at 151. *See also Feres* v. *United States*, 340 U.S. 135, 144 (1950). As pointed out in *Demko*, the lower federal courts have extended this principle to include other statutory systems. *Id.* at 151 n.4.

The application of the *Demko* presumption of exclusivity to any particular fact situation is dependent upon satisfying two critical requirements. First, the individual whose claim may be barred under the principle of exclusivity must be covered by a compensation plan. Second, that

5. 18 U.S.C. §4126 (1970).

plan must provide comprehensive benefits to the injured party. 385 U.S. at 152-53.

We believe that both tests are met in this case. Clearly, Alexander's entitlements under 10 U.S.C. §§1071-85, 42 U.S.C. §213a(a)(2) (1970), including free medical care and disability payments, constitute coverage for purposes of *Demko*. This distinguishes the present case from *United States* v. *Muniz*, 374 U.S. 150 (1963), in which neither plaintiff was covered by a compensation system. *Id.* at 160. Furthermore there can be little doubt that this system "reasonably and fairly" affords relief to those within its purview. Since the health and disability coverage extended to commissioned officers of the PHS is, by statute, made identical to that received by members of the armed forces, 10 U.S.C. §§1071-85, 1201-12, 42 U.S.C. §213a (1970), the Supreme Court's approval of the military compensation plan in *Feres* v. *United States*, 340 U.S. 135, 144 (1950), compels us to find this system comprehensive with regard to Alexander.[6] In addition, these benefits compare quite favorably with those available under two other plans which the Supreme Court has deemed to be exclusive remedies: the Federal Employees' Compensation Act, 5 U.S.C. §§8101 *et seq.* (1970),[7] in *Johansen* v. *United States*, *supra*, at 439-41, and the Federal Prison Industries Fund, 18 U.S.C. §4126 (1970), in *United States* v. *Demko*, *supra*, at 152-53.

Thus, in summary, we believe that the rationale of exclusivity that the Supreme Court expressed in *Demko* is fully applicable to this case. Because Alexander was covered by a comprehensive compensatory plan at the time of

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6. We do not address ourselves, at this point, to the determination by the trial court that Alexander's injury claim was not barred by *Feres*. We refer here to *Feres* only as evidence that the military-PHS coverage is considered to be a comprehensive compensation system.

7. Formerly, 5 U.S.C. §§751-94.

his injury, we hold that his tort recovery was improper. By permitting him to recover, the trial court in effect granted Alexander greater rights than government employees, prisoners, or members of the armed forces. Absent a showing of congressional intent to endow PHS officers with special benefits, the presumption of an exclusive remedy must stand.

Furthermore, we disagree with the trial court's determination that Alexander's suit was not barred by the specific rationale of *Feres v. United States, supra,* as it relates to suits under the Federal Tort Claims Act by members of the armed forces. In our view, the analogy between *Feres* and the present case is so close that it compels the same result.

In *Feres,* the Court considered three claims under the Federal Tort Claims Act, two of which involved medical malpractice by military doctors as in the instant case. 340 U.S. at 137. In holding these suits to be barred, the Court emphasized that the servicemen were already covered by a system of "simple, certain, and uniform compensation for injuries or death." *Id.* at 144. As pointed out above, commissioned officers of the PHS are covered by the same compensation system that applies to members of the armed services.

To further justify their holding, the Court took note of the extraordinary relationship that exists between the members of the armed forces and the government. *Id.* at 143-44. In *United States* v. *Brown,* 348 U.S. 110 (1954), the Court elaborated on this point, stating that tort claims arising out of activity incident to military service were held barred in *Feres* due to

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such

> suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligence orders given or negligent acts committed in the course of military duty * * *. *Id.* at 112.

We are convinced that the relevant conditions of service in the Public Health Service are very similar to those in the armed forces and demonstrate an equally special relationship and need for discipline.

For example, the PHS is designated as one of the "uniformed services" along with the armed forces and the Commissioned Corps of the Environmental Science Services Administration. 10 U.S.C. §1072 (1970). The PHS is organized along military lines, each officer grade having a statutorily stated military rank equivalent. 42 U.S.C. §207 (1970). Regulations specify that failure to follow out orders of superior officers will result in disciplinary action. 42 *C.F.R.* §§21.261-84 (1973). In addition, PHS officers are assigned to active duty status and are subject to recall to duty during any period of leave. 42 *C.F.R.* §§21.88-91 (1973). These similarities to military service illustrate how the concern voiced in *Feres* regarding the effect of tort suits on discipline and internal structure apply with equal force to the Public Health Service.

Counsel for the plaintiff argues, however, that *Feres* is inapplicable here because the injury complained of was not sustained "incident to service." In the development of the *Feres* rationale, this element has been the determinative factor in numerous cases. *See, e.g., Hall* v. *United States,* 451 F.2d 353 (CA1, 1971); *Lowe* v. *United States,* 440 F.2d 452 (CA5), *cert. denied,* 404 U.S. 833 (1971); *Shults* v. *United States,* 421 F.2d 170 (CA5, 1969); *United States* v. *Lee,* 400 F.2d 558 (CA9, 1968), *cert. denied,* 393

U.S. 1053 (1969); *Buckingham* v. *United States*, 394 F.2d 483 (CA 4, 1962); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (CA3), *cert. denied*, 389 U.S. 923 (1967); *United States* v. *Carroll*, 369 F.2d 618 (CA8, 1966); *Chambers* v. *United States*, 357 F.2d 224 (CA8, 1966); *Buer* v. *United States*, 241 F.2d 3 (CA7, 1956), *cert. denied*, 353 U.S. 974 (1957). *See also* Annot., 64 A.L.R.2d 679 (1959). *But see Hale* v. *United States*, 416 F.2d 355 (CA6, 1969). In our view, the facts and the ample authority from this and other circuits support a determination that Alexander's elective surgery was incident to service for purposes of the *Feres* doctrine.

In the first place, PHS regulations clearly indicate that even when Alexander was in the hospital on sick leave, he was considered to be on active duty status, subject to recall. 42 *C.F.R.* §21.91 (1973). This fact immediately distinguishes this case from *Brooks* v. *United States*, 337 U.S. 49 (1949), in which the plaintiff was on furlough when injured; and from *United States* v. *Brown*, 348 U.S. 110 (1954), in which the plaintiff was injured by an army surgeon after his discharge from the service. *See United States* v. *Lee*, 400 F.2d 558, 560-61 (CA9, 1968), *cert. denied*, 393 U.S. 1053 (1969); *Knight* v. *United States*, 361 F.Supp. 708, 713 (W.D. Tenn. 1972), *aff'd*, 480 F.2d 927 (CA6, 1973).

This court has, in the past, given a broad reading to the phrase, "incident to service." For example, in *Chambers* v. *United States*, 357 F.2d 224 (CA8, 1966), Judge Mehaffey, writing for the court, indicated that as long as the serviceman was engaged in an activity "related to and dependent upon his military service" while "subject to military control," any consequent injury would be "incident to service." *Id.* at 229 & n.4. Later that same year, we held that even when a military relationship is entered into at the choice of the plaintiff, the status of being subject to "military courtesies and discipline" brings the activity within the

"incident to service rule." *United States* v. *Carroll*, 369 F.2d 618, 621 (CA8, 1966).

In addition to these cases, two recent decisions from the Fifth Circuit are particularly relevant here. In *Shults* v. *United States*, 421 F.2d 170 (CA5, 1969), that court made it clear that malpractice committed upon a serviceman in a military hospital was incident to service even though he was on leave at the time he was admitted. The court stated:

> It is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status * * *. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service." *Id.* at 171-72.

Subsequently, the Fifth Circuit, in *Lowe* v. *United States*, 440 F.2d 452 (CA5), *cert. denied*, 404 U.S. 833 (1971), extended this rationale to include elective surgery performed upon a serviceman at the advice of military doctors.

Given the expansive view this court expressed in *Chambers* and *Carroll* with regard to "incident to service," these two cases are especially persuasive. In the present case, as in *Shults*, Alexander was operated upon in a military hospital solely because of his employment status. By joining the PHS, he became subject to the privileges and limitations that attend that Service. He chose to avail himself of the service-related medical treatment. Clearly, under *Shults*, his operation was incident to his service as a PHS officer. Furthermore, as in *Lowe*, the fact that Alexander's surgery was elective in nature does not alter the result. On these facts, we are convinced that the suit should have been decided on the basis of *Feres*.

Various damage-related issues were argued to this court on appeal. We do not consider those issues inasmuch as we have determined that this action should have been dismissed on the liability issue.

Reversed with instructions to dismiss at appellant's costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-461

ALECK ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 500 F. 2d 1. The memorandum and order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1974. The petition for a writ of certiorari was filed on October 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the compensation program for officers in the Public Health Service is the exclusive remedy for injuries inflicted on such officers by governmental negligence.

2. Whether, in any event, the Federal Tort Claims Act provides a remedy for a commissioned officer of the Public Health Service who incurs a duty-connected injury.

STATEMENT

Petitioner Alexander, a commissioned officer of the Public Health Service (the Service), underwent elective surgery at a military hospital for removal of his gall bladder. He was entitled to such free medical care as a member of the "uniformed services," as defined in 10 U.S.C. 1072(1).[1]

During the course of the operation, an anesthesiologist's tube placed in petitioner's trachea malfunctioned, because of either improper insertion or inadequate monitoring by the supervisory personnel. As a result, petitioner suffered numerous physical infirmities, including temporary blindness and paralysis, residual uncoordination of the feet and upper extremities, and permanently defective vision.

Due to these injuries petitioner was rated completely disabled and placed on temporary disability retirement status for a period of approximately two and one-half years, pursuant to the procedures specified in 10 U.S.C. 1201 and 1202. During that time he was paid disability compensation in excess of $44,000 under the Career Compensation Act.[2] On August 6, 1972, Alexander was recalled to active duty with the Service as provided in 10 U.S.C. 1210 and 1211.

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[1]10 U.S.C. 1072(1) provides:

> "Uniformed services" means the armed forces and the Commissioned Corps of the Environmental Science Services Administration and of the Public Health Service.

[2]See 10 U.S.C. 1202, 1401, 42 U.S.C. 213a.

Petitioner filed this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671-2680, to recover damages for the alleged negligence of the doctors and other medical personnel who had participated in his anesthetization. The district court found that petitioner "in March 1968 [the month of his operation] was generally on active duty * * * with the United States Public Health Service and as such was entitled to medical, surgical, and hospital care by the United States" (App. 26).[3] The district court held, however, that petitioner was entitled to recover because his "injury-causing accident * * * had nothing to do with the * * * career of the plaintiff * * * involved" (App. 19). Accordingly, finding government negligence, the district court entered judgment in favor of petitioner (App. 16-37, 46-50).

The court of appeals reversed, holding that petitioner's suit should be dismissed on the basis of the principles established in *United States* v. *Demko*, 385 U.S. 149 (Pet. App. A4-A5):

> [W]e believe that the rationale of exclusivity that the Supreme Court expressed in *Demko* is fully applicable to this case. Because Alexander was covered by a comprehensive compensatory plan at the time of his injury, we hold that his tort recovery was improper. By permitting him to recover, the trial court in effect granted Alexander greater rights than government employees, prisoners, or members of the armed forces.

The court of appeals also held, as an independent basis for reversal, that petitioner's suit was barred by *Feres* v. *United States*, 340 U.S. 135, since "the analogy between *Feres* and the present case is so close that it compels the same result" (Pet. App. A5).

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[3] "App." refers to the Appendix in the court of appeals.

ARGUMENT

The court of appeals' decision rests on two independent grounds, each sufficient to support the outcome. Each of the grounds is correct, and there is no conflict among the circuits. Moreover, the decision is of limited importance since, to our knowledge, this is the first suit ever brought by a Public Health Service Officer under the Federal Tort Claims Act to recover damages for an injury for which he was compensated under the Career Compensation Act.[4] Accordingly, further review by this Court is not warranted.

1. This Court has repeatedly held that federal employees whose injuries are compensable under a comprehensive statutory compensation scheme may not bring a suit under the Federal Tort Claims Act. *United States* v. *Demko*, *supra*; *Patterson* v. *United States*, 359 U.S. 495; *Johansen* v. *United States*, 343 U.S. 427. Such a comprehensive program covers commissioned officers of the Public Health Service. Full medical care is provided at no cost, and disabled officers are entitled, for the duration of any disability, to payments taking the place of employment income.[5]

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[4]One similar suit has been filed subsequently, *Bumberg* v. *United States*, No. 72-3721-T (D. Mass.) (pending).

[5]The court of appeals here held that petitioner "was covered by a comprehensive compensatory plan at the time of his injury" (Pet. App. A4-A5). The fact that in the instant case the applicable statute provided petitioner "temporary" compensation is of course appropriate to his temporary inability to serve on active duty. Moreover, petitioner remains eligible for continuing medical treatment under 10 U.S.C. 1071, and for all other benefits available to service commissioned officers under 42 U.S.C. 213a. If petitioner had not qualified for reactivation, which he vigorously and persistently sought, he would have been eligible for "permanent" benefits. See 10 U.S.C. 1210. During the two and one-half year period of his temporary disability, he received seventy-five per cent of his basic pay. Petitioner does not allege that the statutory program is insufficiently comprehensive.

Petitioner's primary argument is that the statutory compensation remedies in those cases were exclusive only because the statutes expressly so provided (Pet. 8-9, 10). This contention is incorrect. In *Demko*, *supra*, the compensation program for federal prisoners was silent on whether other federal remedies were excluded. This Court, reasoning that compensation programs traditionally were substitutes for—not complements to—tort remedies, held that "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group." 385 U.S. at 152. The other cases are to the same effect. Statutory silence indicates that the remedy is exlusive and therefore excludes a Tort Claims Act remedy.

Moreover, allowing petitioner's action for damages under the Tort Claims Act would create the anomaly that members of the Commissioned Corps would be the only federal employees who would have that election of remedies, "a congressional purpose not easy to infer." *Demko*, *supra*, 385 U.S. at 152.[6]

2. Because the court of appeals correctly decided that petitioner's statutory compensation program precluded a Tort Claims Act suit, there is no need to consider that court's second holding—that petitioner's suit was also barred by the rationale of *Feres* v. *United States*, 340 U.S. 135.

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[6]Contrary to petitioner's contention (Pet. 9), the receipt by federal judges of *retirement* benefits would certainly not preclude suit under the Federal Tort Claims Act.

Commissioned officers of the Service are covered by the same compensation system that applies to members of the armed services. Moreover, as the court of appeals pointed out, "the relevant conditions of service in the Public Health Service are very similar to those in the armed forces and demonstrate an equally special relationship and need for discipline" (Pet. App. A6). "These similarities to military service illustrate how the concern voiced in *Feres* regarding the effect of tort suits on discipline and internal structure apply with equal force to the Public Health Service" (*ibid.*).

Feres bars Tort Claims Act suits for injuries occurring during or because of military service. The question in this case is whether medical malpractice in elective surgery performed while the officer is on sick leave is sufficiently service related. We submit that it is. In *Feres* itself two of the plaintiffs sought recovery for medical malpractice committed in military hospitals. The courts of appeals consistently have held that malpractice committed upon a serviceman during elective surgery in a military hospital is "incident to service" even though, as here, he was on leave at the time he was admitted. See *Shults* v. *United States*, 421 F. 2d 170 (C.A. 5);[7]

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[7]In *Shults*, *supra*, 421 F. 2d at 171-172, the court held:

> It is true that Shults was injured while on leave and that the leave was never formally cancelled prior to his death. Nevertheless, it is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service."

Lowe v. *United States*, 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833. Such medical malpractice is related to petitioner's service because it was only as part of that ongoing service that petitioner was entitled to free treatment in a military hospital.

United States v. *Brown*, 348 U.S. 110, and *Brooks* v. *United States*, 337 U.S. 49, do not indicate a contrary result. In *Brown* the Court allowed an action under the Tort Claims Act by a veteran who was neither an employee nor a soldier at the time of his alleged injury. *Brown* reasoned that Brown's claim was "not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act." 348 U.S. at 112. But petitioner here was injured while on active duty, as the district court found (App. 26).[8] Because petitioner was on active duty, and since his injury arose out of treatment to which he was entitled only by reason of his active duty status, the rationale of *Feres* precludes Tort Claims Act recovery.

In *Brooks* servicemen were allowed to sue under the Tort Claims Act for injuries occurring on furlough and which "had nothing to do with the Brooks' army career."

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[8]Indeed, petitioner was continued in active duty status until January 31, 1969, ten months after his injury. Active duty status denotes more than mere eligibility for medical benefits; 42 C.F.R. 21.91 provides that even sick leave is a type of active duty status, in which the officer is fully subject to command by and supervision of his superiors in the Service.

337 U.S. at 52. The two Brooks brothers had been injured in a collision with a government truck; the injury was not related to their service.[9]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1974.

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[9]The decision accords with the general law of employment compensation plans: an employee who is injured outside the scope of his employment, and thus outside the employer-employee relationship, is not covered by the plan, 1 Larson, *Workmen's Compensation Law*, §6.10 (1972), and therefore is entitled to seek a remedy in tort. See *United States* v. *Demko*, *supra*, 385 U.S. at 152.